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## Distribution of the 1999-2009 Satellite Royalty Funds

In IPG's September 12, 2016 Opposition to the Motion ("Opposition"), IPG attempts to shrug off its blatant violations of the Copyright Royalty Judges' ("Judges") regulations by mischaracterizing the IPG ADS as a simple correction and minimizing the prejudice MPAA has

suffered due to IPG's attempt to improperly shift its own regulatory and statutory burdens to MPAA. None of IPG's arguments withstand scrutiny.

## ARGUMENT

### **I. The IPG ADS Does Not Comply With Either The Judges' Regulations Or The Copyright Act.**

As explained in the Motion, the IPG ADS does not comply with Section 351.4(c) of the Judges' regulations, which only permits parties to amend their written direct statements "based on new information received during the discovery process." *See* 37 C.F.R. § 351.4(c). IPG argues that Section 351.4 (c) "is permissive, not restrictive," and that it only "recites the technical requirements" for a particular kind of amendment to written direct statements.

Opposition at 6. IPG's argument misstates the law governing amended written direct statements.

Section 351.4(c) was created by the Judges following the enactment of the Copyright Royalty Distribution And Reform Act of 2004 ("CRDRA"). The CRDRA established Section 803(b)(6)(C) of the Copyright Act, which sets forth particular provisions that the Judges were to include in their regulations when promulgated. Significantly, Section 803(b)(6)(C)(i) states as follows:

[T]he Copyright Royalty Judges may allow a participant in a proceeding to file an amended written direct statement based on new information received during the discovery process, within 15 days after the end of the discovery period specified in clause (iv).

17 U.S.C. § 803(b)(6)(C)(i). The legislative history associated with this provision makes it clear that the new statutory language was added to allow parties to "amend their written statements [to] reflect[] additional information gained through the discovery process." *See* 108 H. Rept. 408 (Jan. 30, 2004).

No other type of amendment to written direct statements was contemplated by Congress in enacting the CRDRA, and no other type of amendment is permitted by the Judges' regulations. Indeed, the Judges already made this clear in a prior order in this proceeding, where the Judges described how their current regulation regarding the filing of amended written direct statements differed from prior Copyright Arbitration Royalty Panel ("CARP") regulations:

In the prior regulation, parties were permitted to amend their written cases based on other parties' objections, not just the results of discovery. *See* 37 C.F.R. § 251.45(d) (superseded by chapter III, title 37, C.F.R. (2005)). The current regulation limits amendment of Written Direct Statements (in either rate determinations or royalty distributions) to circumstances in which a proponent has "new information received during the discovery process." *See* 37 C.F.R. § 351.4(c).

*See Amended Joint Order On Discovery Motions* at 2, n.3 (July 30, 2014).

As explained in the Motion (at 2-3), the IPG ADS cannot possibly be based on new information that IPG received in the discovery process, as it was filed on August 31, 2016, *two weeks before* any party was due to produce discovery documents to IPG under the Judges' scheduling order. Indeed, IPG concedes that the IPG ADS was not filed based on documents IPG received in discovery, as IPG argues that the IPG ADS was filed to correct "errors" made by Dr. Cowan, and not based on new information IPG received in discovery. *See* Opposition at 2-3, 6.<sup>1</sup> Clearly, the IPG ADS does not satisfy Section 351.4(c).

In an effort to mask its non-compliance with the regulations, IPG suggests that another regulatory provision, Section 351.4(b)(3), permits parties to file amended written direct statements at any time during the proceeding, and on any basis—as long as the changes cause a "revision" in a party's claimed royalty shares. Opposition at 5-6 (citing 37 C.F.R. §

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<sup>1</sup> IPG attempts to argue that it "technically received its information, *i.e.*, knowledge of its miscalculation, 'during the discovery process.'" Opposition at 6. This argument is completely disingenuous, as it suggests that IPG's communications with its own witness, prior to any party propounding any discovery requests on IPG of any kind, could somehow satisfy the strict requirements of Section 351.4(c). The Judges should disregard this argument.

351.4(b)(3)).<sup>2</sup> But that regulation does not address amended written direct statements *at all*. Section 351.4(b)(3) merely permits a party to revise “its claim or its requested rate.” The reference to “claim” in that section merely refers to a party’s bottomline percentage share(s) it is seeking to receive royalties for in the proceeding, which can be revised “at any time during the proceeding, up to, and including, the filing of the proposed findings of fact and conclusions of law.” *See* 37 C.F.R. § 351.4(b)(3). It *does not* permit the filing of an amended written direct statement, or the modification of a party’s proposed methodology (or presentation of a new methodology) to support such a “revised” royalty claim. Moreover, IPG’s argument is directly contrary to the Judges’ decision in the 2000-2003 Cable Phase II proceeding to exclude the testimony of Alan Whitt because it was submitted out of time, *i.e.*, as a part of the Settling Devotional Claimants’ (“SDC”) Written Rebuttal Statement. *See* 78 Fed. Reg. 64984, 65004 (Oct. 30, 2013). If IPG’s argument were accurate, the Judges would have had to admit Mr. Whitt’s testimony as permitted under Section 351.4(b)(3), which clearly did not occur. Thus, the Judges should reject IPG’s argument, and strike the IPG ADS as filed in violation of the regulations.

## **II. Contrary To IPG’s Claims, The IPG ADS Reflects Substantive Methodological Changes, And Is Not Merely A Correction.**

IPG attempts to underplay the significance and substantive nature of the methodological changes in the IPG ADS, arguing that the IPG ADS reflects only simple corrections. Opposition at 1-4. But once again, IPG either does not understand, or is intentionally mischaracterizing, the nature of the IPG ADS. As explained in the Declaration of Jeffrey S. Gray, Ph.D. (“Gray Declaration”), attached hereto as Exhibit A, the IPG ADS does not merely fix “typographical errors” in Dr. Cowan’s formulas, as IPG suggests. *See* Opposition at 2. Instead, Dr. Cowan has

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<sup>2</sup> IPG also includes a confusing, partially written footnote in this section of its Opposition. *See* Opposition at 6, n.7. The Judges should disregard this footnote.

made “a significant and substantive change in his methodology” by changing the dependent variable in his analysis from the number of distant subscribers to the *natural logarithm* of the number of distant subscribers. See Gray Declaration at 2, ¶ 3.

As Dr. Gray explains, this change is not merely a “correction” by Dr. Cowan:

This change to the left hand side variable, or dependent variable, in each of Dr. Cowan’s regression models is a substantive change. Rather than estimating the relationship between the number of distant subscribers and the number of shows for MPAA, IPG, and SDC, the modified formula in the Cowan Amended Report estimates the relationship between *percentage changes* in number of distant subscribers and the number of shows for MPAA, IPG, and SDC. This substantive methodological change is unrelated to any data corrections.

Gray Declaration at 2, ¶ 3. Dr. Gray agrees with the observations about Dr. Cowan’s formulas in the IPG ADS made by SDC witness Dr. Erkan Erdem in his September 9, 2016 declaration, which was submitted in this proceeding as a part of SDC’s *Reply In Support Of Their Motion For Entry Of A Distribution Order And Motion To Strike Amended Direct Statement Of Independent Producers Group*, filed on September 9, 2016. Dr. Gray also agrees with Dr. Erdem that Dr. Cowan’s decision to change the dependent variable in his regression analysis from the number of distant subscribers to the natural logarithm of the number of distant subscribers is a change in the functional form of his regression models, and is a “modification to the methodology and not a correction in the calculations.” Gray Declaration at 3, ¶ 5.

Dr. Gray reviewed the Declaration of Dr. Charles Cowan (“Cowan Declaration”) that IPG submitted with its Opposition, and he disagrees with Dr. Cowan’s attempts to minimize the significance of his methodological changes in the IPG ADS. Specifically, Dr. Gray disagrees with Dr. Cowan’s claim that language stating that “a similar result is found when the natural logarithm of Y is used as the dependent variable,” which was added to Appendix 2 of his

Amended Expert Report in the IPG ADS, is an “inconsequential observation about the regression formula.” *See* Gray Declaration at 3, ¶ 6. As demonstrated below, Dr. Cowan’s new IPG ADS methodology produces radically different results for IPG in the Program Suppliers category:

<b>Table 1: Dr. Cowan’s Change In Methodology Causes Substantial Changes In IPG’s claimed Program Suppliers Category Royalty Shares</b>				
<i>Royalty Year</i>	<i>Cowan Report (Cable)</i>	<i>Cowan Amended Report (Cable)</i>	<i>Cowan Report (Satellite)</i>	<i>Cowan Amended Report (Satellite)</i>
2000			54.12%	24.33%
2001			48.31%	23.15%
2002			45.63%	20.96%
2003			37.93%	16.70%
2004	86.13%	12.13%	39.24%	14.12%
2005	85.66%	10.46%	42.90%	17.88%
2006	88.23%	12.68%	58.08%	27.80%
2007	82.92%	11.01%	38.86%	27.07%
2008	85.36%	11.38%	27.51%	18.60%
2009	80.51%	6.95%	25.35%	15.48%
<i>Notes: From Cowan Tables 3 and 4 from IPG Direct Statement and IPG Amended Direct Statement.</i>				

Gray Declaration at 4, ¶ 6.

As Dr. Gray observes, Dr. Cowan fails to provide an economic or statistical motivation for his changes to his regression methodology. Instead, Dr. Cowan appears to attribute his new methodological approach to inquiries made by IPG’s counsel. *See* Gray Declaration at 4, ¶ 7 (citing Cowan Declaration at 3, ¶ 9). Amazingly, counsel for IPG admits that he “did not review or consider Dr. Cowan’s report prior to its submission.” Opposition at 3, n.4. However, even if true, the action (or inaction) of IPG’s counsel cannot provide a legitimate basis for IPG to file the IPG ADS. *See* 37 C.F.R. § 351.4(c).

As explained in the Motion, the IPG ADS is not a mere correction, but rather a completely different methodological approach producing radically divergent share results for IPG than those appearing in any of Dr. Cowan’s tables in IPG’s August 22, 2016 written direct

statement.<sup>3</sup> Accordingly, the Judges should not permit the IPG ADS.

### **III. Contrary To IPG's Claims, MPAA Has Been Prejudiced By The IPG ADS**

IPG has not identified any statutory or regulatory provision to support its argument that MPAA is required to demonstrate prejudice as a part of its Motion. Notwithstanding the lack of a burden to demonstrate prejudice here, the fact remains that MPAA *was* prejudiced by the filing of the IPG ADS. IPG does not deny that it filed and served the IPG ADS on August 31, 2016, the day before MPAA and SDC were due to submit their initial discovery requests to IPG in this proceeding. *See* Opposition at 4. IPG also does not deny that it failed to identify what had been changed in the IPG ADS, explain why those changes were made, or demonstrate that they were related to new material that IPG received during discovery, as required by the regulations. Opposition at 6. Instead, IPG argues that its complete failure to meet its statutory and regulatory burdens in this proceeding should be excused, because (in IPG's opinion) the changes in the IPG ADS "were few and obvious" and could be ascertained by "a quick comparison of IPG's Direct Statement and Amended Direct Statement." Opposition at 2. As demonstrated by the Gray Declaration, IPG's characterization of the changes to the IPG ADS in its Opposition is inaccurate.

Contrary to IPG's suggestion, Opposition at 5, the Judges' regulations do not place the burden on MPAA or SDC to interrogate IPG to find out what changes IPG made to the IPG ADS, or to seek an extension of time to accommodate IPG's decision to violate the regulations and the Judges' procedural orders in this proceeding. Rather, the regulations place the burden

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<sup>3</sup> IPG's original August 22, 2016 written direct statement failed to identify which royalty shares it was seeking an award for in this proceeding, which was required under the Judges' regulations. *See* 37 C.F.R. § 351.4(b)(3) ("In the case of a royalty distribution proceeding, each party must state in the written direct statement its percentage or dollar claim to the fund."). Instead, IPG's introductory memorandum just directed the parties and the Judges to review the Expert Report of Dr. Cowan, which included alternative royalty share proposals for the Program Suppliers category and did not specify which particular set of shares IPG was asserting a claim for in this proceeding. *See* IPG Direct Statement at 9-12. IPG's approach is not consistent with the regulations.

squarely on IPG—the party filing an amended written direct statement—to “explain how it differs from the written direct statement it will amend” and to “demonstrate that the amendment is based on new information received during the discovery process.” 37 C.F.R. § 351.4(c). IPG’s failure to meet these burdens as to the IPG ADS clearly prejudiced MPAA.

Rather than clearly articulating what changes were made to the IPG ADS, IPG instead tried to bury its substantive changes in its filing, leaving it to MPAA and SDC to catch them (or not) at their peril. To do so, MPAA was compelled to revise its nearly completed discovery requests to add questions that minimally requested documents underlying the new calculations presented in the IPG ADS. In addition, MPAA was compelled to engage the service of its expert to identify and understand the substantive changes in Dr. Cowan’s methodological approach. In fact, although IPG continues to maintain the ruse that the IPG ADS only corrected certain errors, Dr. Cowan has yet to identify the errors in question. *See* Gray Declaration at 3, ¶ 4. Accordingly, the IPG ADS should be stricken.

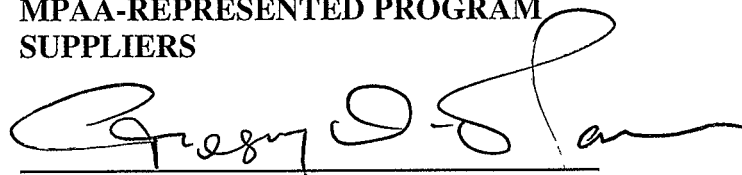
### CONCLUSION

For all of the foregoing reasons, the Judges should grant MPAA’s motion, and strike the IPG ADS from the record in this proceeding.



Respectfully submitted,

**MPAA-REPRESENTED PROGRAM  
SUPPLIERS**

A handwritten signature in black ink, appearing to read "Gregory O. Olaniran", written over a horizontal line.

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Dated: September 16, 2016

### CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of September, 2016, a copy of the foregoing pleading was sent by Federal Express overnight mail to the party listed below.

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\_\_\_\_\_  
Lucy Holmes Plovnick

# **EXHIBIT A**

**Before the  
LIBRARY OF CONGRESS  
Copyright Royalty Judges**

<i>In re</i>  <b>DISTRIBUTION OF 2004, 2005, 2006, 2007, 2008 and 2009 Cable Royalty Funds</b>	<b>DOCKET NO. 2012-6 CRB CD (2004-2009) (Phase II)</b>
<i>In re</i>  <b>DISTRIBUTION OF 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008 AND 2009 Satellite Royalty Fund</b>	<b>DOCKET NO. 2012-7 CRB SD 1999-2009 (Phase II)</b>

**DECLARATION OF JEFFREY S. GRAY, PH.D.**

I, Jeffrey S. Gray, Ph.D., hereby state under penalty of perjury that:

1. I am over eighteen (18) years of age and am employed as President of Analytics Research Group, LLC. I have been retained by the Motion Picture Association of America, Inc. ("MPAA") to serve as an expert witness in the captioned consolidated proceedings. I have personal knowledge of the following facts and, if called and sworn as a witness, could and would competently testify thereto.

2. I have reviewed both the Direct Statement of Independent Producers Group ("IPG") filed on August 22, 2016, which included the Expert Report of Charles D. Cowan, Ph.D. ("Cowan Report") and the Amended Direct Statement of IPG filed on August 31, 2016, which included Dr. Cowan's Amended Expert Report ("Cowan Amended Report").

3. Although I have not yet been provided with discovery documents related to either the Cowan Report or the Cowan Amended Report, it is clear from reviewing those filings that

Dr. Cowan has made a significant and substantive change in his methodology. Dr. Cowan originally estimated the relationship between the number of subscribers and the number of shows for MPAA, IPG, and Settling Devotional Claimants (“SDC”). See Cowan Report at 8, ¶ 32:

$$\begin{aligned} \text{Subscribers} = & a + \sum_{i=1}^{\# \text{ years}} b_i * \text{Indicator}_{\text{Year}} + \sum_{i=1}^{\# \text{ call signs}} c_p * \text{Indicator}_{\text{Call Sign}} + \\ & e * (\#\_IPG\_dev\_shows) + f * (\#SDC\_dev\_shows) + \\ & g * (\#\_IPG\_ProgSupp\_shows) + h * (\#\_MPAA\_shows) \end{aligned}$$

However, in the Cowan Amended Report, Dr. Cowan has modified the formulas of the regressions he states he estimated. Dr. Cowan changed the dependent variable of his analysis from the number of distant subscribers to the *natural logarithm* of the number of distant subscribers. See Cowan Amended Report at 8, ¶ 32:

$$\begin{aligned} \text{Ln (Subscribers)} = & a + \sum_{i=1}^{\# \text{ years}} b_i * \text{Indicator}_{\text{Year}} + \sum_{i=1}^{\# \text{ call signs}} c_p * \text{Indicator}_{\text{Call Sign}} + \\ & e * (\#\_IPG\_dev\_shows) + f * (\#SDC\_dev\_shows) + \\ & g * (\#\_IPG\_ProgSupp\_shows) + h * (\#\_MPAA\_shows) \end{aligned}$$

This change to the left hand side variable, or dependent variable, in each of Dr. Cowan’s regression models is a substantive change. Rather than estimating the relationship between the number of distant subscribers and the number of shows for MPAA, IPG, and SDC, the modified formula in the Cowan Amended Report estimates the relationship between *percentage changes* in number of distant subscribers and the number of shows for MPAA, IPG, and SDC. This substantive methodological change is unrelated to any data corrections.

4. I reviewed the Declaration of Dr. Charles Cowan, filed on September 12, 2016 (“Cowan Declaration”). Dr. Cowan states that “the regression method [he] used in the later

calculations is exactly the same. The variables [he] used are exactly the same. Subscriptions on the left hand side of the equation....” *See* Cowan Declaration at 2, ¶ 5. I disagree with Dr. Cowan’s statement. In the Cowan Amended Report, Dr. Cowan changed the left hand side of the equations he estimated from the number of distant subscribers to the natural logarithm of the number of distant subscribers. These changes are not mere corrections to the data as Dr. Cowan claims (*see* Cowan Declaration at 2, ¶ 3); they are significant methodological changes to Dr. Cowan’s calculations. Dr. Cowan stated that he made corrections to “discovered errors in the earlier processing of the data,” *see* Cowan Declaration at 3, ¶ 9. However, Dr. Cowan does not identify with specificity what errors were corrected.

5. I reviewed the Declaration of Erkan Erdem, Ph.D., filed on September 9, 2016 (“Erdem Declaration”).<sup>1</sup> I agree with Dr. Erdem’s explanation of the changes that Dr. Cowan made to his formulas in the Cowan Amended Report. *See* Erdem Declaration at 2, ¶ 5. I also agree with Dr. Erdem that “[a] change in the functional form of a regression model is a modification to the methodology and not a correction in the calculations.” *See id.* at 2, ¶ 6. Dr. Cowan’s changing of the dependent variable from the number of distant subscribers to the natural logarithm of the number of distant subscribers is a change in the functional form of his regression models.

6. Dr. Cowan added a sentence to his Appendix 2 in the Cowan Amended Report stating that “a similar result is found when the natural logarithm of Y is used as the dependent variable....” *See* Cowan Amended Report at 21, Appendix 2. Dr. Cowan refers to this added sentence as “an inconsequential observation about the regression formula.” *See* Cowan

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<sup>1</sup> The Erdem Declaration was attached to the Settling Devotional Claimants’ Reply In Support Of Their Motion For Entry Of A Distribution Order And Motion To Strike Amended Direct Statement Of Independent Producers Group, filed on September 9, 2016.

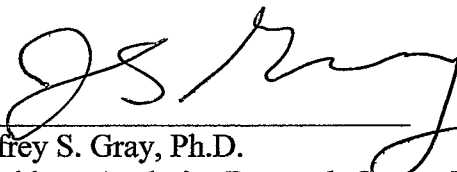
Declaration at 3, ¶ 7. However, Dr. Cowan's change in methodology to analyze the natural logarithm of the number of distant subscribers is far from inconsequential as evidenced by his change in his calculated "relative split in number of distant subscribers." See Cowan Amended Report at 10, ¶ 39 (Tables 3 and 4). Table 1 below reproduces Dr. Cowan's calculated share of distant subscribers for IPG as reported in the Cowan Report and Amended Cowan Report for Cable and Satellite. (Cowan Report Tables 3 & 4; Cowan Amended Report Tables 3 & 4):

<b>Table 1: Dr. Cowan's Change In Methodology Causes Substantial Changes In IPG's claimed Program Suppliers Category Royalty Shares</b>				
<i>Royalty Year</i>	<i>Cowan Report (Cable)</i>	<i>Cowan Amended Report (Cable)</i>	<i>Cowan Report (Satellite)</i>	<i>Cowan Amended Report (Satellite)</i>
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2003			37.93%	16.70%
2004	86.13%	12.13%	39.24%	14.12%
2005	85.66%	10.46%	42.90%	17.88%
2006	88.23%	12.68%	58.08%	27.80%
2007	82.92%	11.01%	38.86%	27.07%
2008	85.36%	11.38%	27.51%	18.60%
2009	80.51%	6.95%	25.35%	15.48%
<i>Notes: From Cowan Tables 3 and 4 from IPG Direct Statement and IPG Amended Direct Statement.</i>				

7. Dr. Cowan does not provide any economic or statistical motivation for why he changed his regression methodology. Instead, the only motivation he provides is that the changed calculations were because "IPG's counsel immediately inquired about the produced results." See Cowan Declaration at 3, ¶ 9. I have not been provided the documentation necessary to determine what portion of the changes in Dr. Cowan's allocations are due to Dr. Cowan's errors and what portion of the changes are due to Dr. Cowan's change in methodology. However, as Table 1 above demonstrates, Dr. Cowan has made significant and substantive changes to his results in the Cowan Amended Report.

I declare under penalty of perjury under the laws of the District of Columbia that the foregoing is true and correct, and of my personal knowledge.

Executed this 15th day of September, 2016, at Washington, District of Columbia.



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Jeffrey S. Gray, Ph.D.  
President, Analytics Research Group, LLC